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PARTICIPANT COMPENSATION IN THE CLINTON ADMINISTRATION

*Carl Tobias**

A half-decade ago in the pages of this journal,¹ I suggested that the Bush Administration, the federal administrative agencies, and Congress seriously consider revitalizing participant compensation. Participant compensation is the agency payment of expenses that members of the public incur when they are involved in administrative proceedings. Initiatives in the executive and legislative branches supported my recommendation that both branches revive this valuable mechanism for facilitating citizen participation in agency processes.

First, Congress had been exploring ways of increasing public involvement in administrative proceedings for twenty years, while the federal courts had recognized a right of citizen participation in agency proceedings in 1966.² Because many individuals and public interest groups possess relatively meager resources to sustain their involvement, by, for example, collecting, analyzing, synthesizing, and submitting empirical data, the participatory right could essentially be rendered meaningless. Participation compensation, therefore, responded to this need.

Second, all of the presidential administrations since that of President Richard Nixon and many earlier Congresses had experimented with some form of participant compensation. Considerable evidence indicated that participant funding was a comparatively efficacious technique for enhancing citizen involvement in agency processes and concomitantly for improving the quality of administrative decisionmaking.

Notwithstanding my thoroughgoing recitation of the background of

* Professor of Law, University of Montana. I wish to thank Peggy Sanner for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and the Harris Trust for generous, continuing support. Errors that remain are mine.

1. See Carl Tobias, *Reviving Participant Compensation*, 22 CONN. L. REV. 505 (1990).

2. See *id.* (congressional exploration); Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) (court recognition).

participant compensation, my trenchant assessment of its advantages and disadvantages, and my compelling suggestions for revitalization and continued experimentation, the silence was deafening. Much to my chagrin, the Bush Administration neither introduced legislation which would have specifically authorized participant compensation nor suggested that agencies rely on their implied authority to reimburse parties, as some administrative entities, such as the Consumer Product Safety Commission, had done in the 1970s.³ Congress evinced little more sympathy toward participant funding, passing no authorizing legislation and adopting gigantic budgets which provided no money for participant compensation.⁴

I may yet be vindicated, however. It is no secret among the cognoscenti that new presidential administrations invariably look back to their predecessors for ideas, and in few areas is this maxim more true than administrative law, practice, and procedure. Moreover, the Carter Administration experimented most comprehensively, and most successfully, with participant compensation. The Clinton Administration is the first Democratic Administration in a dozen years, and it has been scrutinizing the efforts of the Carter Administration, albeit cautiously, primarily to learn from Carter's mistakes.⁵ Now that President Clinton has reached the mid-point of his term in office and has achieved some of his substantive initiatives, the Clinton Administration may be willing to consider participant funding.

President Clinton has invoked the idea of a new covenant with the American people, a foremost tenet of which is inclusiveness, especially citizens' participation in the operation of their government. Participant reimbursement is one effective mechanism for facilitating the involvement of resource-poor individuals, and previously excluded persons, in administrative decisionmaking which affects them.

3. See Carl Tobias, *Great Expectations and Mismatched Compensation: Government Sponsored Public Participation in Proceedings of the Consumer Product Safety Commission*, 64 WASH. U. L.Q. 1101 (1986) [hereinafter CPSC]. See generally Carl Tobias, *Of Public Funds and Public Participation: Resolving the Issue of Agency Authority to Reimburse Public Participants in Administrative Proceedings*, 82 COLUM. L. REV. 906 (1982) [hereinafter *Public Funds*].

4. Congress apparently had so little interest in funding that it considered unnecessary the adoption of appropriations riders proscribing funding, an activity which enjoyed popularity in the 1980s. See, e.g., Department of Housing and Urban Development—Independent Agencies Appropriations Act of 1986, Pub. L. No. 99-160, § 410, 99 Stat. 909, 931 (1985); Department of the Interior and Related Agencies Appropriations Act of 1981, Pub. L. No. 96-514, 94 Stat. 2957, 2976 (1980).

5. See, e.g., Adam Clymer, *Clinton Tries to Learn from Carter and History*, N.Y. TIMES, Dec. 6, 1992, at E4, col. 1.

The above factors mean that President Clinton, the federal agencies, and Congress could well, and probably should, revitalize participant funding. The most important information that the executive and legislative branches ought to consider in deciding whether to revive participant reimbursement appears below. Moreover, if the Chief Executive, the agencies, and Congress conclude that revitalization is warranted, numerous recommendations for how the government should proceed are offered in the remainder of this essay.

Participant compensation had sufficient promise to support its revitalization.⁶ Citizen funding provided a number of benefits throughout agency decisional processes. Reimbursed participants promoted prompt, accurate, and fair administrative treatment of disputed questions. Those compensated designated and clarified the issues, interests, and options that decisionmakers needed to take into account and provided information and perspectives which agencies lacked. The persons and organizations paid also helped administrative officials evaluate the material and arguments submitted to the agencies and make well-informed choices. A presidential administration and a Congress whose highest priority is improving the American economy should remember that incorrect governmental decisionmaking could be very harmful to economic prosperity.⁷

Participant funding did have certain disadvantages. Some individuals and groups that received citizen reimbursement minimally or detrimentally affected administrative decisionmaking, offered erroneous or undocumented information, or presented their views in ways that negatively affected the proceedings. The incidence and gravity of these disadvantages, however, seemed significantly less than the benefits.

A number of detriments may simply have been the fixed costs of early experimentation with what was otherwise an effective concept. Agencies can correspondingly remedy numerous additional difficulties that they encounter in implementing participant compensation. Moreover, the decreased employment of participant funding during the Reagan and Bush administrations can be ascribed more to the mechanism's relatively controversial nature as a matter of economics and politics than to the technique's comparative efficacy.⁸

6. I rely substantially here on Tobias, *CPSC*, *supra* note 3, at 1157-58; Tobias, *Public Funds*, *supra* note 3, at 941-45.

7. See Tobias, *Public Funds*, *supra* note 3, at 945.

8. See Tobias, *supra* note 1, at 511. See generally Barry B. Boyer, *Funding Public Participation in Agency Proceedings: The Federal Trade Commission Experience*, 70 GEO. L.J. 51

Finally, but perhaps most importantly for an administration and a Congress which are seriously concerned about the economy and the growing federal deficit, participant reimbursement was apparently rather inexpensive.⁹ The governmental expenditures, both in terms of the costs of administering the compensation programs and in terms of the funding actually paid to public participants, were relatively small. Participant reimbursement was, therefore, a cost-effective approach for facilitating citizen involvement in administrative processes.

In short, participant compensation seems to have been a sufficiently promising concept to warrant revitalization. Public funding was not such a resounding success, however, as to support broad-scale, much less government-wide, revival. The Clinton Administration, the agencies, and Congress, therefore, should revitalize the mechanism and experiment with it in properly-tailored circumstances.

Selective experimentation should proceed at enough agencies, for an adequate period, in a sufficient number of contexts to be representative and diverse while permitting a fair assessment of participant reimbursement's effectiveness.¹⁰ Compensation should be employed in a variety of circumstances, because funding's efficacy was situation-specific and the quality of program administration varied significantly from agency to agency. For instance, reimbursement might be instituted at agencies and in contexts in which earlier experimentation proved valuable or appeared promising.

Administrative agencies which believe that compensated participation could be helpful should seriously explore the prospect of revival. They must evaluate prior experimentation and determine how best to deploy participant funding. Agencies should create programs which are appropriately measured, are sufficiently flexible to permit modification and recalibration, and are carefully administered. When awarding reimbursement, administrative officials should keep in mind that citizen input is most likely to improve agency substantive determinations when agency decisionmakers are receptive to, and need, the public's contributions and when compensated participants have particular ability to respond to that need. Governmental entities must have adequate resources to operate their funding efforts well and to permit those reimbursed to participate effectively. Agencies that think they lack the requisite

(1981).

9. See Tobias, *supra* note 1, at 518-19; see also Tobias, *Public Funds*, *supra* note 3, at 952-53 (costs at several agencies).

10. I rely substantially here on Tobias, *supra* note 1, at 520-22.

resources or specific authority to compensate should seek them from Congress.¹¹

Congress should be responsive to the agencies. The legislative branch ought to include in appropriations statutes the money needed to run programs and fund participants. Moreover, Congress should expressly prescribe participant reimbursement in substantive measures once it has systematically analyzed prior efforts and identified felicitous contexts for future compensation endeavors. Congress at least should refrain from imposing prohibitions on participant funding in appropriations legislation.¹²

Should Congress not afford agencies explicit authority to reimburse, they might want to consider invoking implied power to initiate circumscribed compensation efforts. If these programs operate efficiently, and assist the agencies, Congress should support this administrative experimentation. The federal courts should invalidate these endeavors only when governmental units have clearly exceeded their authority.

All, or a fair representation, of the citizen involvement which agencies fund must be rigorously assessed.¹³ Evaluators ought to analyze reimbursed participation for a sufficient period to provide a measure of statistical validity. The entities which perform studies must be independent of the governmental bodies being examined yet be familiar with those agencies and the compensation idea. After participant funding has been scrutinized, more definitive conclusions about its efficacy should be posited.

Participant reimbursement is one successful, albeit controversial, administrative program that the Clinton Administration, the agencies, and the newly-elected 104th Congress should revive. If experimentation proceeds in appropriately-tailored circumstances, compensated public involvement will enhance agency decisionmaking and include more citizens in the operations of the modern administrative state.

11. See Tobias, *Public Funds*, *supra* note 3 (comprehensive analysis of authority issue).

12. See *supra* note 4 and accompanying text. See generally Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 458.

13. I rely substantially here on Tobias, *supra* note 1, at 523; Tobias, *CPSC*, *supra* note 3, at 1118-28.